

Neutral Citation Number: [2024] EWHC 1247 (Admin)

Case No: AC-2023-CDF-000072

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 23 May 2024

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

Between:

THE KING
on the application of RUSSELL MCPHEE **Claimant**
- and -
THE SECRETARY OF STATE FOR JUSTICE **Defendant**

Olivia Beach (instructed by **Bhatia Best Solicitors**) for the **Claimant**
Adam Payter (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 16 May 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 May 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. The claimant, Mr Russell McPhee, who is now aged 47 years, is a serving prisoner, currently at HMP Erlestoke, a category C prison. On 16 December 2005, when he was 28 years old, he was sentenced to Imprisonment for Public Protection (“IPP”) with a tariff of 3 years, 5 months and 11 days. That tariff expired on 26 May 2009. On three occasions—in 2012, 2016 and 2019—the claimant has been released on licence, but on each occasion the licence has been revoked and he has been returned to custody. The total time for which the claimant has been on licence in the community during his sentence is nearly 4½ years. The last occasion of revocation of the licence was in September 2020, when the claimant had been at liberty on licence for a continuous period of 14 months. (On that occasion, the claimant remained unlawfully at large for three weeks after the revocation of his licence.)
2. At a hearing on 4 November 2021 the Parole Board reviewed the questions whether the claimant ought to remain in custody and, if he ought so to remain, whether a recommendation should be made that he be transferred to the open estate. That hearing was adjourned in order that further work could be undertaken on the claimant’s risk management plan. On 14 March 2022 the Parole Board issued its decision, after receiving further evidence and submissions. It did not make a direction for release, but it did recommend that the claimant be transferred to open conditions.
3. By a decision dated 16 March 2023 (“the Decision”) the defendant, the Secretary of State for Justice, decided not to accept the recommendation of the Parole Board and not to transfer the claimant to open conditions.
4. At a hearing on 12 February 2024, I gave permission to the claimant to apply for judicial review of the Decision. The sole ground of challenge is that the Decision was an irrational departure from the decision of the Parole Board and so was unlawful. The claimant seeks an order quashing the Decision and directing the defendant to reconsider it.
5. At the hearing of the claim, I was informed that the Parole Board is due to hold another hearing to consider the claimant’s possible transfer to open conditions on 12 June 2024. It is inevitable that, whatever the outcome of the present claim, any further decision by the defendant will be made in the light of further evidence produced since the Decision.
6. I am grateful to counsel, Ms Olivia Beach for the claimant and Mr Adam Payter for the defendant, for their clear and focused written and oral submissions, which I found to be of great assistance.

The Law

7. Before me, counsel were in agreement as to the law. I set out my understanding of the relevant law in *R (Oakley) v Secretary of State for Justice* [2024] EWHC 292 (Admin) (“*Oakley No. 2*”) at [6]-[21]. As I have not yet been caused to change my mind¹ and as

¹ The Court of Appeal has given permission to appeal the decision in *Oakley No.2*.

counsel did not suggest that my understanding was incorrect, I see no purpose in repeating here what I said there.

8. In summary, however, the position is as follows. The decision whether or not to move a prisoner to open conditions is for the defendant, not for the Parole Board; the latter only makes a recommendation. However, the defendant must take the recommendation into consideration and give it appropriate weight. The defendant will always be required to give sufficient reasons to justify a departure from the recommendation of the Parole Board. The nature and strength of the required justification will depend on the precise point of disagreement and, where the Parole Board's conclusion turns on a matter on which the Parole Board enjoyed a significant advantage over the defendant (for example, and classically, an issue of fact involving credibility of witnesses from whom the panel heard oral evidence), the defendant will be required to demonstrate a very good reason for disagreeing with the Parole Board's recommendation. See, for a more complete exposition, *R (Overton) v Secretary of State for Justice* [2023] EWHC 3071 (Admin) at [25]-[31] (Eyre J). The policy governing the circumstances in which the Secretary of State will depart from the recommendations of the Parole Board is set out in the *Generic Parole Process Policy Framework* ("the Policy"), the version of which in force at the date of the Decision included the following provisions:

"5.8.2 PPCS [Public Protection Casework Section] may consider rejecting the Parole Board's recommendation if the following criteria are met:

- The panel's recommendation goes against the clear recommendation of report writers without providing a sufficient explanation as to why;
- Or, the panel's recommendation is based on inaccurate information.

5.8.3 The Secretary of State may also reject a Parole Board recommendation if it is considered that there is not a wholly persuasive case for transferring the prisoner to open conditions at this time."

9. In the present case, the defendant relied on paragraph 5.8.3 of the Policy when rejecting the Parole Board's recommendation.

The Parole Board's Recommendation

10. The Parole Board's panel considered an 859-page dossier and various additional documents that were received after the initial hearing in July 2021. The additional documents included an addendum report from the claimant's most recent Community Offender Manager ('COM'), Mr Sproates-Davies², an updated Offender Assessment System ("OASys") report, and an updated security report. Relevant oral evidence was received from Mr Sproates-Davies and from Mr Clive Vincent, the Prison Offender Manager ("POM") at HMP Erlestoke. The claimant was represented at the hearing by

² Mr Sproates-Davies had taken over management of the claimant's case shortly before the second hearing. His predecessor, Ms Charmaine Smart, gave evidence at the first hearing.

a person from the solicitors then acting for him. The defendant was not represented at the hearing.

11. The panel's decision was produced on 14 March 2022. I shall cite extensively from it below, but I have had regard to the entirety of the document and not just to the parts quoted or otherwise mentioned.
12. In section 1 of its decision, the Parole Board recorded matters pertaining to the offence for which the claimant had been imprisoned ("the index offence") and past offending behaviour. It recorded that, having previously minimised his responsibility for what he had done, he now took full responsibility and appeared to recognise the impact on the victim of the index offence and others who had been present. Paragraph 1.5 said: "The panel considers that alcohol significantly impacted on the events in the index offence, in disinhibiting all present, but also impacting on Mr McPhee's decision making and ability to regulate his emotions." The decision recorded that all three recalls to custody had involved allegations of domestic violence towards partners; no conviction for domestic violence had resulted on those occasions (the claimant did have an earlier conviction for assaulting one of his partners), but during his latest period on licence the claimant had been convicted of battery of a man in a public house, for which he received a conditional discharge.
13. Paragraph 1.8 of the decision recorded that in 2018 the claimant had been given a probable diagnosis of Antisocial Personality Disorder and a recommendation that he "transfer to the progression regime at HMP Erlestoke to complete core risk reduction work." Paragraph 1.12 recorded that, prior to the last occasion of his release on licence in 2019, the claimant had successfully completed the Building Better Relationships ("BBR") programme and had been identified as someone who "had matured and was able to learn from past mistakes." Paragraph 1.13 recorded: "The panel considers that Mr McPhee's troubled relationship history has been a key area of risk, which became apparent from the point of his first recall but which has been reinforced over what is now three recalls on licence." Having recorded various allegations of incidents of domestic violence during the claimant's latest period of release on licence, paragraph 1.24 recorded: "The panel assesses that Mr McPhee has sought to minimise the level of instability and problems within his significant relationships. ... [The panel] does however note the pattern of reports of concerning behaviour, repeated in three relationships over many years, including following the apparently successful completion of specific risk reduction work aimed at behaviour within relationships." The decision continued (I have redacted some names, here and elsewhere):

"1.25. The panel also notes the assessment by Police of Ms J [the person with whom the claimant has had his most recent 'significant relationship'] as a high-risk victim of domestic abuse from Mr McPhee.

1.26. Perhaps most pertinent is Mr McPhee's decision making within his relationship with Ms J having been released for the third time on IPP licence, and having completed the BBR programme. His continuation of the relationship, despite reports to Police of alleged violent behaviour, and where he says he was in fact the victim of assault by Ms J, indicate poor consequential

thinking, a lack of understanding of the concerns of those managing him, and a lack of emotional regulation on his part.

1.27. The panel notes that Mr McPhee says he has now ended the relationship with Ms J, and she has also confirmed this to Mr Sproates-Davies. They say they remain close friends, and the panel notes that Mr McPhee continues to speak to Ms J almost daily, sometimes for lengthy periods. Mr McPhee told the panel this was primarily to discuss problems with L, his daughter with Ms G [a person with whom he was formerly in a relationship] who has regular contact with Ms J, and that he continues contact also because he has no other contact outside of the prison. The panel is sceptical of that account, and considers it likely that Mr McPhee and Ms J still have strong feelings for each other (Mr McPhee told the panel at the July 2021 hearing how he had loved Ms J) and that there must be, on the balance of probabilities, a likelihood of them resuming their relationship after he is released.

...

1.30. The panel notes with some concern that after recall [in 2020], Mr McPhee was unlawfully at large for a period of three weeks, and was eventually located staying in a Holiday Inn with Ms J, where he was arrested and returned to prison. The panel is concerned that he sought to evade detection and chose to be with Ms J when he was aware of the professionals' concerns about their relationship.

1.31. On his last release, Mr McPhee told the panel he would engage with MBT [Mentalisation-based Therapy] in the community, but once released, declined to do so. He told this panel that the timing was not right for him to do that work, and he wanted to establish himself before beginning the work. The panel understands the importance of feeling able to engage with the work, otherwise it is unlikely to be effective, but is concerned that Mr McPhee changed his mind relatively quickly after release, and remained disengaged until the point of his recall, which suggests a lack of motivation. The panel have concerns that he was again seeking to manage impressions when he offered the same promises to this panel in the oral hearing in November 2021.

1.32. Mr McPhee disputes that his recall was fair. The panel has considered the circumstances which led to the recall and is satisfied that it was fair and appropriate. Other measures had been taken prior to the recall to attempt to manage the increasing risk, which had not been successful, and therefore recall was required in order to maintain public protection.”

14. Section 2 of the panel’s decision was headed “Analysis of Evidence of Change (The Present)”. It recorded that after his latest recall Mr McPhee had been transferred in March 2021 to HMP Erlestoke, which was understood to have facilities to help him better to apply his learning and thereby to increase confidence that he would in future comply with licence conditions. After his arrival at HMP Erlestoke in March 2021, the claimant had quickly moved to the Super Enhanced Unit, where he was employed as a serverly worker and his interactions with male and female staff were “polite and appropriate”. Mr Vincent had developed a good working relationship with the claimant and had found his behaviour to be excellent. Concerns were recorded regarding the continued level of contact between the claimant and Ms J, as well as the nature of some of that contact and one telephone conversation in particular, and it was noted that she was believed to be “his only source of personal support in the community.” However, Mr Vincent believed that the claimant had now recognised that, after three recalls, he was at a crossroads in his life and that he was genuine in his expressed desire to end his relationship with Ms J. The decision continued:

“2.10. Mr McPhee has been unable to complete risk reduction programme work since his recall, but has engaged well with the progressive regime at HMP Erlestoke and all reports of his behaviour in custody are very positive

2.11. It is Mr Sproates-Davies’ assessment that Mr McPhee has been unable to reflect on his learning, based on his record of behaviour when last in the community and when thinking particularly about the learning from the BBR programme he completed after his last recall and before his third release.

2.12. Mr Vincent disagreed with Mr Sproates-Davies in that assessment, and in Mr Vincent’s opinion he was able to reflect on what he learned during the Self Change Programme, and particularly about how he manages himself. He had evidenced those skills when he learned that Ms Smart was no longer his Community Offender Manager, and when he learned his new Community Offender Manager was not supporting his release. Mr Vincent told the panel that after the last hearing, Ms Smart had indicated to Mr McPhee that, despite the concerns around his phone call with Ms J and the non-disclosure material, she would continue to recommend his release. In those circumstances Mr Vincent found it understandable that initially Mr McPhee did not want to engage with Mr Sproates-Davies when he told him he had a different view to Ms Smart, and would not be supporting his release, but that Mr McPhee had been able to see that everyone was entitled to their opinion, even if he did not agree with it.

2.13. The panel on balance agreed with Mr Sproates-Davies’ assessment, and found that Mr McPhee has been able to a degree to use the skills to manage his emotions within the custodial environment, but there was little if any evidence (other than self-report) to confirm he was consistently applying his learning within the context of relationships in the community.”

The panel recorded (paragraphs 2.19 to 2.23) that Mr Sproates-Davies remained of the opinion that risk presented by the claimant was not yet manageable in the community. He assessed the level of the claimant's risk to the general public as medium and the level of his risk to future partners and to known adults, such as Ms J, as high. The risk to children was assessed at medium and related to the possibility that they would witness abusive and violent behaviour within a relationship between the claimant and their mother. A SARA (Spouse Assault Risk Assessment) in October 2021 had concluded that the claimant presented a high risk of future intimate partner violence.

15. The panel recorded what it was told by the claimant himself:

“2.16. Mr McPhee told the panel he is a different man now to when he committed the index offence, and that he no longer has a temper, and has done a lot of work to recognise his triggers. He also reflected that his decision not to engage in MBT was wrong. He told the panel that drugs are no longer an issue for him, and that he knows alcohol will always be a risk, but he does not intend to drink heavily in future.

2.17. When discussing his relationship with Ms J, Mr McPhee did not consider that she was or could be frightened of him, and told the panel that instead it is she who gets angry, often very quickly once an argument starts. He said that whilst he understood their relationship was a threat to his continuing liberty on licence, he continued the relationship because he loves and cares about her.

2.18. Mr McPhee, in his evidence to the panel, continued to deny much of the domestic abuse alleged by his three significant partners ... The panel assessed that Mr McPhee continues to minimise his behaviour within relationships, and to minimise the patterns that are evident, including partners repeatedly feeling the need to call Police. Whilst Mr McPhee is able to speak clearly about his learning from BBR, he aligns that to his verbally abusive behaviour in the past with partners. Having completed that work, he was unable to use the skills learned in order to have a healthy relationship with Ms J, even on his own account. The panel also noted with concern that Mr McPhee has consistently declined to discuss the allegations of domestic abuse (other than flat denials) with Mr Sproates-Davies.”

16. The concluding paragraphs of section 2 are significant.

“2.24. Both Mr Sproates-Davies and Mr Vincent agree that Mr McPhee has no further core risk work to complete. They disagree on the element of consolidation and evidencing which is necessary before release can be supported. Mr Vincent sees no benefit to Mr McPhee returning to open conditions, noting that he successfully completed a period there prior to a previous release, that he spent some considerable time in the community prior to recall, and that whilst he does not present a risk of

abscond or a level of risk which cannot safely be managed within open conditions, there would be no benefit either to Mr McPhee or in reduction of his risk.

2.25. Mr Sproates-Davies, on the other hand, considers that further consolidation of the learning from the BBR when there will be opportunity to evidence his management of his emotions, through testing in open conditions when he will have access to periods of ROTLs [release on temporary licences] and a better understanding can be obtained of the relationship between him and Ms J, is necessary for public protection. Mr Sproates-Davies assesses that he is very much at the early stages of implementing that learning, as has been seen by his conduct in the telephone conversation with Ms J in June 2021. Mr Sproates-Davies also wants to see evidence of Mr McPhee’s expressed commitment to undertaking MBT which he told the panel could be undertaken on ROTLs arranged by the OPD [Offender Personality Disorder] pathway, into which Mr McPhee is screened. Mr Vincent was not so sure that would be possible. Mr Sproates-Davies also wants to obtain a better understanding of whether there is something preventing Mr McPhee from applying his learning, and he considers this will only become clear after Mr McPhee has started to engage in MBT work.”

17. Section 3 of the Parole Board’s decision was “Analysis of the Manageability of Risk (The Future)”. It read in part:

“3.1. The panel has concluded that the risk factors currently present are situations where Mr McPhee feels provoked or attacked, either by a partner or an unknown member of the public, or if he suffers a perceived slight from a partner; arguments and conflict within relationships; financial difficulties; feelings of grievance, and situations where he struggled to reflect on his offending behaviour work. Alcohol and drug misuse would also be significant risk factors, impacting as they would on his ability to think clearly and regulate his emotions.

3.3. The risk management plan identified by Mr Sproates-Davies includes him initially residing in Approved Premises, with no current bedspace specifically identified, but it is hoped he could be accommodated within the Bristol area. He would be subject to alcohol testing within the Approved Premises, and close monitoring with a curfew, check-in times during the day, and regular appointments with a keyworker and other staff members.

3.4 He has been screened into the OPD Pathway Project, and so psychologists would be involved in supporting his supervising officer, as well as assessing him for and implementing the MBT work. Any other appropriate one-to-one work would also be identified.

...

3.7 However, the panel noted and agrees with Mr Sproates-Davies' concerns about the ability of the risk management plan to manage Mr McPhee's risk. His last period on licence, after completing specific risk reduction work around relationships, presented a number of occasions where he disregarded advice from his supervising officer about his relationship with Ms J, which led to additional conditions having to be imposed, which were again broken when he stayed in the Holiday Inn with her whilst unlawfully at large. There were a number of Police call outs, which underlined the importance of complying with those conditions. He was convicted of a further offence of violence, and there were allegations of violence made, although not prosecuted. Notably, having indicated strongly at the last hearing that he would engage with MBT work on release, he then refused to do so.

3.8 The panel agrees that the MBT work is likely to be a very important part of enabling [Mr McPhee] to apply learning in a better and more consistent way, particularly within relationships. His relationship with Ms J, albeit said at this time not to be as a partner but as a friend, is very likely (in the panel's assessment) to continue at least in that form if not resuming as an intimate relationship, and the risk management plan as it stands will only manage that risk if Mr McPhee complies. Therefore compliance is key part of the assessment of risk in this case, and the panel has concerns that he will not comply. Evidence and history has shown, in Mr McPhee's individual case, that his good compliance and engagement in custody is not a guide to his compliance and engagement in the community."

18. Section 4 of the decision was the "Conclusion". In the light of the matters set out in the earlier parts of the decision, the panel concluded that it was not satisfied that the claimant's risk within relationships could be safely managed in the community at that time and that it remained necessary for the protection of the public that he remain confined; therefore, no direction for release was made. The Conclusion continued:

"4.11. The panel then moved on to consider whether he is suitable for progression to open conditions.

4.12. Looking at the progress he has made, it is agreed that there is no further core risk reduction work for him to complete, he has had a successful period of time in the progressive regime at HMP Erlestoke, and he is reported to have been better at managing his emotions, stress and feelings of depression, albeit not to the level the panel would need to see in the community for risk to be manageable on release.

4.13. The benefits of a move to open conditions would be the ability for Mr McPhee to access ROTLs, for professionals to

monitor his relationship with Ms J in less secure and restricted conditions so that the recent changes which are reported to the relationship can be looked at over a more prolonged period, and the way in which he manages the relationship during periods of temporary release can be monitored and discussed with him and Ms J (if she is prepared to do so). If Mr Sproates-Davies is correctly informed, he will be able to access MBT whilst on ROTLs, which would be very beneficial. He can also look to gain work experience and potential work placements, and to build a support network in the community outside of Ms J. His compliance can also be better tested.

4.14. The panel is satisfied that the risk he poses is manageable in those less secure conditions, given his good general compliance in custody, and the short periods he would be on temporary licence.

4.15. Finally, the panel agrees that he does not pose a significant risk of absconding, although it cannot be ignored completely given his period of being unlawfully at large after recall.

4.16. Having balanced those four factors, the panel has decided to recommend Mr McPhee's progression to open conditions. It will now be for the Secretary of State to decide whether to accept that recommendation.

4.17. A future panel considering Mr McPhee's case is likely to benefit from evidence of him engaging with MBT (if it is made available to him), a review of how he has managed his relationships in less secure conditions, and evidence of him applying the learning from previous risk reduction work."

The Decision

19. The defendant's Decision letter stated that, having considered the claimant's dossier, the reports that were before the Parole Board and the panel's recommendation, he had decided to reject the recommendation on the ground that there was not at that time a wholly persuasive case for transferring the prisoner to open conditions (paragraph 5.8.3 of the Policy). The defendant noted evidence of positive progress, including engagement with thinking skills, a Cognitive Self Change Programme, parts of the Healthy Relationships Programme, Building Better Relationships, and a Progression Regime. The letter then set out the reasons why the defendant was nevertheless reaching a different conclusion from that of the Parole Board:

"However, evidence considered to support the conclusion that the criteria is [sic] not met is as follows:

- The most recent OASys identifies that you pose a high risk of serious harm in the community to the public and to know[n] adults, and a medium risk to children. The probability of re-offending (including non-violent) is

high, probability of violent re-offending is medium, and RSR is medium.

- You have completed a range of offence focused work which worryingly you have been unable to apply to situations arising in your life in the community. You have been recalled to prison on three separate occasions, demonstrating your inability to apply this learning and to utilise skills when the need arises.
- Your relationships have been and continue to be a significant concern in terms of your perpetration of domestic violence and minimisation of this behaviour. It is considered that you do not fully take responsibility for your actions and have blamed others.
- *'The panel assesses that Mr McPhee has sought to minimise the level of instability and problems within his significant relationships. There have been a high number of Police call outs across the totality of his relationship history, and a pattern of allegations of aggressive and violent behaviour, both physically and verbally, albeit not resulting in convictions.'* (Decision, 1.24)
- There are concerns around compliance in the community from your COM and the Secretary of State considers that this is likely apply [sic] to your compliance with ROTL, if located in open conditions. Additionally, it is recognised that you spent a period of three weeks unlawfully at large following your most recent recall.
- You have spent two periods in open conditions to date. The first was prior to his [sic] first release in 2012, for a period of 11 months. The second was in 2015 for approximately 5 months before you were returned to closed conditions because of substance misuse related concerns.
- *'His relationship with Ms J, albeit said at this time not to be as a partner but as a friend, is very likely (in the panel's assessment) to continue at least in that form if not resuming as an intimate relationship, and the risk management plan as it stands will only manage that risk if Mr McPhee complies. Therefore compliance is key part of the assessment of risk in this case, and the panel has concerns that he will not comply. Evidence and history has shown, in Mr McPhee's individual case, that his good compliance and engagement in custody is not a guide to his compliance and engagement in the community.'* (Decision 3.8)

- It is the view of all report writers and the panel that there is no core risk reduction remaining for you to undertake. However, it was also agreed that there is further work to be undertaken to consolidate the learning that you has [sic] already gained, and that you must work on developing and utilising skills to manage your behaviour. It is acknowledged that you have been participating in the Progression Regime at HMP Erlestoke, which is a positive step.
- There is a clear area of risk surrounding your intimate relationships and domestic violence within those relationships. The COM confirms that your most recent relationship has now ended, however they think it likely that it will be restarted once you are in the community.
- *'It is also worrying that Mr McPhee, based on his own evidence to the panel, appears not to understand the level of concern by professionals and the panel around his risk in relationships. The panel found him to have minimised his concerning behaviour, which has continued even in custody as evidenced by the threatening phone call to Ms J in June 2021.'* (Decision 4.7)
- *'The issues with his manageability are twofold – the likelihood of him understanding the level of risk he poses and the likelihood of him complying with licence conditions, based on his history of poor compliance in the community, and his minimisation of his behaviour.'* (Decision 4.9)
- The Secretary of State shares the panel's concerns around your compliance in the community, which, is considered would also relate to your likely compliance when in open conditions on ROTL. The panel and report writers do not view that you present an abscond risk, although the panel have recognised that the period of three weeks unlawfully at large is a concern.
- On balance, the Secretary of State does not assess that a progressive transfer to open conditions is appropriate at this time given your history of non-compliance and recalls, offending behaviour, and inability to utilise your learning from completed offending behaviour work.

The Secretary of State therefore confirms that it is necessary for you to remain in a closed prison environment and continue to work towards evidencing a reduction in your risk in preparation for your next parole review. You are encouraged to work with staff supervising you to understand what is required of you in the

lead up to your next review to assist your progression and to explore the options available to you.”

20. Accordingly, the same matters that had led the Parole Board to conclude that the claimant’s risk could not yet be managed in the community after release on licence led the defendant to conclude that it had not been demonstrated that the risk could be managed while the claimant was on day-release on temporary licence. The Decision did not contradict the conclusion of the report writers and the panel that there was no core risk reduction remaining for the claimant to undertake, but it noted that they had also agreed that there was further work to be undertaken to consolidate the learning that the claimant had already gained and that he must work on developing and utilising skills to manage his behaviour; the defendant considered that this work ought to be undertaken in closed conditions. Although the Decision referred to the fact, recorded in the panel’s decision, that the claimant had spent three weeks unlawfully at large after his last recall in 2020, the defendant appears to have relied on this as supporting concerns regarding likely compliance with licence conditions rather than as indicating a significant risk of absconding.

Summary of the Arguments

21. The claimant challenges the Decision on the ground that the defendant has not shown any sufficient reason for departing from the recommendation of the Parole Board and that the Decision is therefore irrational. Ms Beach developed this challenge in three interlinked strands: first, that the defendant had placed undue reliance on the history relating to the claimant’s three recalls but had failed to have due regard to the progress made since then; second, that the defendant’s insistence that the claimant must “continue to work towards evidencing a reduction in [his] risk” failed to engage with the uncontradicted conclusion that there was no further core risk reduction work for the claimant to undertake or with the view of Mr Sproates-Davies and the panel that evidence of reduced risk was now to be looked for in less secure (that is, open) conditions; third, that, as the claimant had served many years over his tariff, the defendant was entitled to reject the panel’s recommendation only if it appeared for good reason to be unjustified or inadequately reasoned, which was not the case.
22. For the defendant, Mr Payter’s response was to the following effect. The decision whether to move to open conditions was one for the defendant, as was the assessment of the weight to be given to relevant matters. His rejection of the panel’s recommendation did not rest on disagreement as to any matter on which the conclusion of the panel had a presumptive priority (such as a finding of fact made in the light of oral evidence received at the hearing, for example a finding that there was no further work for the claimant to do in closed conditions—cf. *R (Oakley) v Secretary of State for Justice* [2022] EWHC 2602 (Admin), [2023] 1 WLR 751) but rather on an evaluation of risk. The defendant has given clear and sufficient reasons for reaching a different overall evaluation on that matter: first, the level of risk posed by the claimant if he were released from open conditions on temporary licence; second, the history of non-compliance on previous recalls; third, the claimant’s inability to utilise his course-based learning in practice. These three factors were recognised also by the Parole Board. The difference concerned the evaluative assessment to be made in the light of them. The defendant was entitled to reach the conclusion he did.

Discussion

23. Mr Payter is correct to say that the defendant is entitled (indeed, required) to make his own decision and “may ascribe different weight to material factors in the risk/benefit balancing exercise” (*R (Kumar) v Secretary of State for Justice* [2019] EWHC 444 (Admin), [2019] 4 WLR 47, *per* Andrews J at [54]). Further, I accept that the management of risk in open conditions is a matter that falls squarely within the defendant’s expertise and responsibility (*R (McKoy) v Secretary of State for Justice* [2023] EWHC 3047 (Admin), *per* Judge Elizabeth Cooke, sitting as a judge of the High Court, at [45]); he is entitled to disagree with the Parole Board’s opinion on such matters, which has no presumptive priority. Nevertheless, the defendant is required to demonstrate a good reason for rejecting a recommendation for transfer to open conditions. For the avoidance of doubt, I do not suggest that the defendant is required to show a “very good” reason for rejecting the recommendation. What is required is proper engagement with the Parole Board’s assessment and a cogent and rational justification for making a different assessment, even if that justification is not one with which others will necessarily agree.
24. However, I do not think that the Decision shows any such reason. This is not to say that rejection of the recommendation would necessarily be irrational, only that whether or not a good reason could be given no such reason has been given.
25. It seems to me that the Decision rests on two key points of disagreement with the Parole Board. First, and more crucially, whereas the Parole Board considered that the claimant’s risk, though not yet manageable in the community, was manageable in open conditions, the defendant disagreed. Second, whereas the Parole Board considered that further progression needed to be made and evidenced in open conditions, the defendant considered that it should be made and could be demonstrated in closed conditions.
26. As to the first and more fundamental of these points, the Decision rests on what is said in the fifth bullet point (paragraph 19, above): “There are concerns around compliance in the community from your COM and the Secretary of State considers that this is likely [to] apply to your compliance with ROTL, if located in open conditions.” (See also the twelfth bullet point.) The problem with this is that it does not rise above the level of assertion and is not accompanied by any reasoning. Neither the POM, Mr Vincent, nor the COM, Mr Sproates-Davies, had given evidence that the risk could not be managed in open conditions, and the panel accepted that it could be managed in open conditions, though it rejected Mr Vincent’s view that it could be managed in the community. The identified risk concerned primarily the claimant’s behaviour within intimate relationships with women; that being so, the conclusion in paragraph 4.14 of the panel’s decision letter (paragraph 18 above) makes sense and the defendant has not given any proper reason for disagreeing with it. The Decision records, as part of its supporting evidence: “The COM confirms that your most recent relationship has now ended, however they think it likely that it will be restarted once you are in the community.” This, however, is abstracted from the context of Mr Sproates-Davies’s wider evidence, which viewed the likelihood of a resumption of the relationship as a reason for opposing release but not a transfer to open conditions and specifically identified the need to assess the relationship during a period in open conditions. As for the defendant’s reliance on previous recalls, which drew Ms Beach’s fire, the main problem seems to me to be that this relates to periods of release on licence, not to release on temporary licence while in open conditions. The Decision records that the claimant had twice been in open conditions. The first occasion had been for a period of 11 months, and the defendant

does not indicate any disagreement with Mr Vincent's statement that the period had been successfully completed, as indeed it must have been as it ended with the claimant's first release in 2012. The defendant records that the second occasion lasted for five months before the claimant was returned to closed conditions in 2015 "because of substance misuse related concerns." Whatever those concerns may have been, I note that the claimant was actually released on licence the following year. The panel received evidence from the claimant that drugs were no longer an issue for him and that, while he recognised that alcohol would always be a risk, he did not intend to drink heavily in future, and it is clear that the totality of the evidence received by the panel did not cause it to consider that a transfer to open conditions would be inappropriate because of any likelihood of substance misuse. The defendant did not suggest the contrary. A further problem with the emphasis on past recalls is, as Ms Beach submitted, that the focus is away from the progress recorded since the latest recall. The Decision did refer to evidence of positive progress but does not manifest any genuine engagement with it, and I cannot see how consideration of that evidence was actually integrated into the defendant's reasoning in respect of the management of risk in open conditions. This is relevant also to the other area on which the defendant differed from the panel.

27. As to the second point of disagreement (further risk-reduction work), the defendant did not contradict the evidence of Mr Vincent and Mr Sproates-Davies and the conclusion of the panel that the claimant had no further core risk work to complete. The point of disagreement between Mr Vincent and Mr Sproates-Davies was on "the element of consolidation and evidencing which is necessary before release can be supported" (panel's decision, paragraph 2.24). The Decision recorded that "it was also agreed that there is further work to be undertaken to consolidate the learning that [the claimant] has already gained" and concluded that "it is necessary for you to remain in a closed prison environment and continue to work towards evidencing a reduction in your risk in preparation for your next parole review." The reason why the further work was to be undertaken in closed conditions was the prior conclusion that the risk was not manageable in open conditions, which was the first point of disagreement. Beyond that, there are two problems with the defendant's conclusions regarding further work. First, he did not address the significance attached by Mr Sproates-Davies and the panel to *evidencing*, not merely consolidation: see in particular paragraphs 2.25 and 4.13 of the panel's decision letter. The progress apparently made by the claimant since his transfer to HMP Erlestoke is relevant here. The panel's approach may, I think, be paraphrased as follows: the claimant has been making good progress since his last recall; however, past experience shows that we cannot be confident that the progress will be reflected in compliance in the community; therefore, before we can direct release on licence, and in order to know whether the progress can be applied in anything other than secure conditions, it is necessary to assess the claimant in less secure conditions (where his risk can be managed). This aspect of necessary monitoring is not addressed by the defendant, presumably because of his conclusion regarding risk management. The second problem with the defendant's approach to further work is that he does not identify what further work remains to be done in closed conditions. The conclusion says that the claimant must "continue to work towards evidencing a reduction in [his] risk" but does not say what this work will comprise or how such evidence is to be provided. The evidence to the panel from Mr Sproates-Davies was that the evidence needed to be provided in open conditions, and the panel accepted that view. The problem is compounded by the encouragement in the conclusion "to work

with staff supervising you to understand what is required of you ... and to explore the options available to you”, since neither the POM nor the COM was identifying further work to be done in closed conditions and the claimant has already successfully participated in HMP Erlestoke’s Progression Regime. The importance of engaging properly with the manner in which further progress is both to be achieved and to be demonstrated is all the greater where, as here, the prisoner is significantly post-tariff.

28. In conclusion, the defendant was free to reject the Parole Board’s recommendation, provided he gave a good reason for doing so. In my judgment, the justification that he gave did not provide any cogent reason for rejecting the recommendation but rested on mere assertion. Accordingly, I shall quash the Decision. The defendant must reconsider the matter. As things have turned out, any reconsideration will necessarily take account of further evidence recently provided to the Parole Board³. If the next hearing takes place as scheduled, there is also likely to be a further recommendation from the Parole Board, to whatever effect.

³ Mr Payter told me that Mr Sproates-Davies has provided a further report, which indicates that, although the OPD Pathway is itself available to prisoners in open conditions, he was mistaken to believe that MBT work is also available to them. I note that the panel did not assume that his belief was correct (see paragraph 4.13 of its decision letter) and that the defendant said nothing on the point either way. I was not told anything about what other new evidence might come from Mr Sproates-Davies or otherwise.